

August 5, 1993

This is in response to your correspondence of May 11, 1993, requesting an opinion on several alcohol testing issues and two questions concerning the drug testing regulations.

At the present time, I cannot provide you with an agency position or opinion on the six alcohol testing questions outlined in your correspondence. At this time, the Research and Special Program Administration (RSPA) is involved in developing a final rule involving the alcohol testing program. As there is no duly promulgated rule in place, there is nothing on which I can base an opinion. Please let me know if you remain interested in issues concerning alcohol following the issuance of a final rule in the Federal Register.

With regard to the two drug testing issues involving the use of a consent form in conjunction with the collection of a Department of Transportation (DOT) urine specimen and a clarification on post-accident testing, the answer to your questions are outlined below:

QUESTION: Your correspondence indicates that nowhere in the anti-drug regulations contained at 49 CFR Parts 199 and 40 does it clearly state that DOT does not allow the use of employer consent forms. You request written documentation which clearly states that the use of an employer consent form in connection with DOT testing is not allowed and if any operator is utilizing such a form, and is audited, DOT will consider it to be a basis for imposing a penalty.

ANSWER: Section 40.25(f)(22)(ii) of Part 40 regulations stipulates *"When specified by DOT agency regulation or required by the collection site (other than an employer site) or by the laboratory, the employee may be required to sign a consent or release form authorizing the collection of the specimen, analysis of the specimen for designated controlled substances, and release of the results to the employer. The employee may not be required to waive liability with respect to negligence on the part of any person participating in the collection, handling or analysis of the specimen or to indemnify any person for the negligence of others."*

This regulation permits use of consent or release forms by certain entities under specific conditions. The term "other than an employer site" contained in the regulations has been interpreted by the DOT to prohibit employers from requiring employees to sign any type of consent or release form. Use of such a consent or release form by the employer may be cause for a finding of violation and assessment of a civil penalty. Non-employer operated collection sites and NIDA laboratories, however, may require consent or release forms under the conditions specified in the regulation.

QUESTION: According to our recent discussion, if an employee is involved in an accident, and is unconscious and cannot evidence consent to the drug test, the employer may not obtain a sample and store it until the employee is able to evidence consent.

Again, this is another issue that is based on interpretation. In 49 CFR Part 199.11 it clearly states "If an employee is injured, unconscious, or otherwise unable to evidence consent to the drug test, all reasonable steps must be taken to obtain a urine sample." In no way do I interpret this to say that the operator cannot obtain a sample and wait for consent before testing. Would you please provide clarification on this issue.

Answer: Several issues surrounding post-accident testing have been presented by operators and contractors. These issues center around collection of a specimen from an individual who has been hospitalized or is unconscious and cannot evidence consent to the drug test. An initial opinion letter issued on August 14, 1989, indicated that *"If an employee is unconscious or otherwise unable to evidence consent to the procedure, the medical facility should collect the sample, after the condition of the employee has been stabilized."* The opinion was revised on September 4, 1992, in an effort to provide more clarification concerning the collection of a specimen from an unconscious individual. Several operators have indicated that many medical facilities are refusing to comply with the operator's request for the collection of a specimen when circumstances meeting the requirements of Section 199.11(b) have occurred.

In an effort to eliminate confusion on this issue, we have developed the following interpretative language:

- A pipeline operator must take all reasonable steps to obtain a urine sample from an employee following an accident.
- In the case of a conscious, but hospitalized employee, the operator should request that the hospital or medical facility obtain the sample from the employee.
- If an employee is injured, unconscious (*employee is unable to communicate*), or otherwise unable to evidence consent (*employee is unable to sign custody and control form*) to the drug test, all reasonable steps must be taken to obtain a urine sample from the employee.
- If an employee is conscious (*employee can communicate*) and he/she is able to evidence consent (*employee able to sign custody and control form*) to the drug test and is able to void normally (*without aid of catheters*) the specimen shall be collected.
- If an employee who is subject to post-accident testing is conscious, able to urinate normally (in the opinion of a medical professional), and refuse to be tested, that person must be removed from duty in accordance with Section 199.9.
- An operator shall develop written procedures/guidelines for employees and supervisors who are involved in accident situations which require post-accident testing.

- An operator may decide not to test under the post-accident provisions, but such a decision must be based on the best information available immediately after the accident that the employee's performance could not have contributed to the accident or that, because of the time between that performance and the accident, it is not likely that a drug test would reveal whether the performance was affected by drug use.

The issues surrounding the use of consent forms and clarification of post-accident provisions concerning unconscious individuals and collection of specimens will be included in those interpretations.

Thank you for your inquiry. Please let me know if you need additional information about our drug testing requirements.

Sincerely,

Richard L. Rippert
Drug Compliance Coordinator
Office of Pipeline Safety
Compliance